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A Survey Of Recent Developments In The Law: Jurisdiction and the Internet

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VIII. JURISDICTION AND THE INTERNET

A. Introduction

Businesses in Minnesota and throughout the world are rushing to take advantage of the Internet to advertise goods and services,¹ unaware of the many legal pitfalls present in this medium of communication.² One of these pitfalls is the extent to which a business utilizing the Internet is subject to personal jurisdiction in Minnesota, other states, or other nations.³ This article surveys four recent decisions in this area.

B. State *ex rel.* Humphrey v. Granite Gate Resorts, Inc.

State ex rel. Humphrey v. Granite Gate Resorts, Inc.,⁴ is the first case in Minnesota to address the issue of whether a foreign defendant can be held amenable to personal jurisdiction in Minnesota for

1. See Mark Sableman, *Business on the Internet, Part I: Jurisdiction*, 53 J. MO. B. 137, 137 (1997). Based on twelve 1996 cases addressing Internet jurisdiction issues, Mr. Sableman concludes that the posting of an Internet site in connection with the active offering of sales of goods or services will probably subject the advertiser to jurisdiction anywhere in the United States where the Internet can be accessed. See *id.*

2. See *id.*; see also Howard G. Zaharoff & Thomas W. Evans, *Cyberspace and the Internet: Law's Newest Frontier*, 41 BOSTON B. J. 14, 24-25 (1997).

3. See Sableman, *supra* note 1, at 137. Jurisdiction concerns for businesses arise in both criminal and civil cases. See *id.* See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261 (6th Cir. 1996) (trademark infringement and unfair trade practices); *United States v. Thomas*, 74 F.3d 701, 705-06 (6th Cir. 1996) (violation of federal obscenity statute); *Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F. Supp. 413, 419 (D. Ariz. 1996) (breach of contract, libel, defamation, tortious interference, and violating the Lanham Act); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 166 (D. Conn. 1996) (trademark infringement); *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1329 (E.D. Mo. 1996) (trademark infringement and unfair competition); *Playboy Enters., Inc., v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1034 (S.D.N.Y. 1996) (trademark infringement, false designation of origin, unfair competition, and violations of the New York Anti-Dilution Statute); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 297 (S.D.N.Y. 1996) (trademark infringement); *Naxos Resources (U.S.A.) Ltd. v. Southam Inc.*, 24 Media L. Rptr. 2265, 2267-68 (C.D. Cal. 1996) (defamation).

4. 568 N.W.2d 715 (Minn. Ct. App. 1997), *aff'd*, 576 N.W.2d 747 (Minn. 1998).

transacting business via the Internet with Minnesota residents.⁵ Instead of laying out a clear, concise, jurisdictional framework for Internet users, the Minnesota Supreme Court completely dodged this problematic issue with the following order:

Based upon all the files, records and proceedings and, upon an evenly divided court, IT IS HEREBY ORDERED that the decision of the court of appeals dated September 5, 1997, be, and the same is, affirmed. Dated: May 14, 1998.⁶

By making this order, the Minnesota Supreme Court missed the opportunity to clear confusion from its past decisions⁷ and provide a clear framework for future Internet related jurisdictional questions.

1. *Facts*

Kerry Rogers ("Rogers"), a Nevada resident, is president of Granite Gate Resorts, Inc. ("Granite Gate"), a Nevada corporation that conducts business as On Ramp Internet Computer Services ("On Ramp").⁸ On Ramp provided Internet advertising for companies who marketed products directed at the Las Vegas tourist industry.⁹ On Ramp also provided advertising for WagerNet, an on-line wagering service that planned to make on-line gambling available by the fall of 1995.¹⁰ Rogers designed the on-line advertisement for WagerNet and it included a phone number, mailing list, and an electronic subscription by which people could get more information.¹¹ The advertisement also included information on the gambling service, instructions on how to set up the necessary hardware and software, and discussed the fees that would be charged for

5. No. C6-95-7227, 1996 WL 767431 (Minn. Dist. Ct. Dec. 11, 1996), *aff'd*, 568 N.W.2d 715, 718 (Minn. Ct. App. 1997), *aff'd*, 576 N.W.2d 747 (Minn. 1998).

6. *Granite Gate Resorts*, 576 N.W.2d at 747.

7. See Scott M. Hagel, *Civil Procedure—The Stream of Commerce Theory In Minnesota: Does the Shoe Fit? In re Minnesota Asbestos Litigation*, 552 N.W.2d 242 (Minn. 1996), 24 WM. MITCHELL L. REV. 231, 251 (1998).

8. See *Granite Gate Resorts*, 568 N.W.2d at 716-17.

9. See *id.* at 717. The URL address for On Ramp is <http://www.vegas.com>. See *id.*

10. See *id.*

11. See *id.*

placing bets.¹² It also provided a warning that the user should consult with "local authorities" before registering with WagerNet.¹³ Interestingly, Rogers set up the gambling service as being based in Belize, although for all practical purposes operations were to be run out of Nevada.¹⁴

WagerNet's web page was accessible by a link from the Las Vegas tourist information web page.¹⁵ It "listed the terms and conditions to which an Internet user assented by applying for the private access card and the special hardware and software required to access WagerNet's services."¹⁶ The page noted that any customer wishing to bring a claim against WagerNet must do so in a Belizian court.¹⁷ The page also noted, however, that WagerNet could sue consumers in their home states to prevent them "from committing any breach or anticipated breach of this Agreement and for consequential relief."¹⁸

On July 5, 1995, a consumer investigator for the Minnesota Attorney General's office called the toll-free telephone number displayed on an On Ramp site that advertised All Star Sports, a sports handicapping service, and asked how to bet on sporting events.¹⁹ The investigator was told to call Rogers.²⁰ The investigator dialed

12. *See id.*

13. *See id.*; *see also* *MN Online Scams* (visited Aug. 2, 1999) <<http://www.ag.state.mn.us/home/consumer/consumernews/OnlineScams/memo.html>>. The State of Minnesota posts a warning on its Internet site that states:

Warning to all Internet users and providers. This memorandum sets forth the enforcement position of the Minnesota Attorney General's Office with respect to certain illegal activities on the Internet. Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of State criminal and civil laws.

MN Online Scams (visited Aug. 2, 1999) <<http://www.ag.state.mn.us/home/consumer/consumernews/OnlineScams/memo.html>>. *See generally* *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (discussing Internet-related personal jurisdiction issues in criminal proceedings). In *Thomas*, the Sixth Circuit held that venue in Tennessee over California defendants was proper given the fact that the defendants knew that the product they were selling over the Internet was being transmitted to Tennessee. *Id.* at 709.

14. *See Granite Gate Resorts*, 568 N.W.2d at 717.

15. *See id.*

16. *Id.*

17. *See id.*

18. *Id.*

19. *See id.*

20. *See id.*

the number he was given and spoke with Rogers.²¹ The investigator identified himself as a Minnesota resident who was interested in placing bets via the on-line gambling service.²² Rogers told the investigator how to access WagerNet, that betting with the site was legal, and that the service would hopefully be operational by the 1995 football season.²³

In July 1995, the Minnesota Attorney General filed a complaint against the operators of WagerNet, alleging that they had engaged in deceptive trade practices, false advertising, and consumer fraud by advertising in Minnesota that Internet gambling is legal.²⁴ In October 1995, by using a fictitious name, the Attorney General's investigator was put on the WagerNet mailing list and subsequently received an on-line confirmation stating that he would be sent updates on the WagerNet service.²⁵ The operators of WagerNet then filed a motion to dismiss for lack of personal jurisdiction,²⁶ contending that Minnesota computer users must take some affirmative action to view their on-line advertisements and that the nature of its advertisements were passive, not active.²⁷

21. *See id.* The telephone number the investigator was given to call was the same number to which the WagerNet site directed Internet users to call to obtain further information about the site. *See id.*

22. *See id.*

23. *See id.*

24. *See id.* Federal law prohibits the interstate or foreign transmission of both betting information and bets by one engaged in the business of betting or wagering through wire communications facilities, including telephone wires. *See* 18 U.S.C. § 1084 (1994). Minnesota forbids commercial sports betting. *See* MINN. STAT. §§ 609.75, subds. 2-3; 609.755(1); 609.76, subd. 2; and 609.02, subd. 2 (1998). The Attorney General contended that the WagerNet and All Star advertising in Minnesota explicitly and implicitly represented that betting is lawful. *See Granite Gate Resorts*, 568 N.W.2d at 717. Therefore, Defendants violated the Minnesota Consumer Protection Statutes, which forbid false advertising, deceptive trade practices and consumer fraud. *See id.* at 720.

25. *See State ex rel. Humphrey v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431, at *4, *9 (Minn. Dist. Ct. Dec. 11, 1996).

26. *See id.* at *1.

27. *See id.* at *9. *Cf. Playboy Enters., Inc., v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996) (noting that it was irrelevant that a local user had to "pull" images from a computer in Italy rather than defendant "sending" them to the United States). The court in *Playboy* found distribution of trademark protected images to the United States from a web site in Italy subjected the Italian defendant to personal jurisdiction. *See id.* at 1040, 1044.

2. *Ramsey County District Court Decision*

The Ramsey County District Court judge allowed limited discovery to determine the quantity and quality of the defendants' contacts with the state.²⁸ Rogers refused to produce the names of the persons on the WagerNet mailing list, claiming that the information was the sole property of a Belizian corporation.²⁹ Because the defendants refused to produce the information, the district court found that as a matter of law, the WagerNet mailing list contained the name and address of at least one Minnesota resident.³⁰ Thus, the district court denied the defendants' motion to dismiss for lack of jurisdiction.³¹

3. *Minnesota Court of Appeals Decision*

The Minnesota Court of Appeals affirmed the district court's decision, initially finding that Minnesota's long-arm statute³² allowed Minnesota to "assert jurisdiction over defendants to the extent that federal constitutional requirements of due process [would] allow."³³ The court then applied a five-prong test to determine if minimum contacts existed and whether exercising personal jurisdiction would comport with fair play and substantial justice.³⁴ The five-prong test requires that Minnesota courts evaluate: (1) the quantity of the contacts with the forum state, (2) the nature and the quality of the contacts, (3) the source and connection of the cause of action with these contacts, (4) the interest of the state in providing a forum, and (5) the convenience of the parties.³⁵ "The first three factors are of primary importance."³⁶ In close cases,

28. See *Granite Gate Resorts*, 1996 WL 767431, at *1.

29. See *id.* at *5.

30. See *id.* See also *State ex rel. Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 718 (Minn. Ct. App. 1997), *aff'd*, 576 N.W.2d 747 (Minn. 1998).

31. See *Granite Gate Resorts*, 1996 WL 767431, at *1.

32. See MINN. STAT. § 543.19 (1998). The long-arm statute provides in pertinent part that "a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any nonresidential individual . . . if . . . the foreign corporation or nonresident individual . . . [t]ransacts any business within the state." *Id.* subd. 1.

33. *Granite Gate Resorts*, 568 N.W.2d at 718 (quoting *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 29 (Minn. 1996)).

34. See *id.*

35. See *id.*

36. *Id.* (citing *Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1340 (8th Cir. 1983)).

"doubts should be resolved in favor of retention of jurisdiction."³⁷ The court summarily rejected the defendant's argument that it had not purposefully availed itself to the privileges of Minnesota and that assertion of personal jurisdiction would not comport with the traditional notions of fair play and substantial justice.³⁸

a. Quantity of Contacts

In this case, Granite Gate's contacts with Minnesota included not only on-line communications, but also voice-telephone and mail communications with Minnesota residents.³⁹ The court found the quantity of contacts sufficient because the defendant's advertisements were available 365 days a year to any Internet user.⁴⁰ Moreover, in a two-week period, 248 Minnesota computer users browsed the defendant's web page.⁴¹ Based on these facts, the court held that the quantity of contacts were sufficient to meet the first prong of the five-part test.⁴²

b. The Nature and the Quality of Contacts

The court then analogized on-line advertisement to broadcast media,⁴³ radio,⁴⁴ and direct mail solicitation.⁴⁵ The court stumbled

37. *Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408, 411-12 (Minn. 1992).

38. *See Granite Gate Resorts*, 568 N.W.2d at 718. The court concluded that submission to personal jurisdiction would not unduly inconvenience Granite Gate. *See id.* at 721.

39. *See id.* at 718-19.

40. *See id.*

41. *See id.* at 718.

42. *See id.* The court erroneously relied on *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), to draw this conclusion. The logic of *Maritz* and the court's reliance on it are flawed; on-line advertisements are generally passive—not active as the *Granite Gate Resorts* and *Maritz* courts analogize. *See infra* notes 43-47 and accompanying text.

43. *See Granite Gate Resorts*, 568 N.W.2d at 718 (citing *Tonka Corp. v. TMS Entertainment, Inc.*, 638 F. Supp. 386, 391 (D. Minn. 1985), which held that Minnesota can exert personal jurisdiction over a California corporation that produced television programming that it knew would be broadcast nationwide).

44. *See id.* (citing *BLC Ins. Co. v. Westin, Inc.*, 359 N.W.2d 752, 755 (Minn. Ct. App. 1985), which held that a Wisconsin corporation's purposeful behavior in advertising its Wisconsin bar on a Minneapolis radio station such that it should have reasonably anticipated being haled into a Minnesota court); *see also A. Uberti & C. v. Leonardo ex rel. County of Pima*, 892 P.2d 1354, 1362 (Ariz. 1995) (concluding that because the defendant intended to sell its products to any United States citizen, it could be held accountable in any jurisdiction where its products cause injury).

in its reasoning when it stated, "Internet advertisements are similar to broadcast and direct mail solicitation in that advertisers distribute messages to Internet users, and users must take affirmative action to receive the advertised product."⁴⁶ In fact, the vast majority of on-line advertisements are passive and require the users to download the information that is simply being stored on a server in a distant location.⁴⁷ More importantly, the physical scopes of the other broadcast mediums are known to businesses. In contrast, the Internet, while not infinite, is globally accessible and the physical location of Internet users is generally unknown to businesses.

c. *The Source and Connection of the Cause of Action with these Contacts*

The court made a stronger case for the relationship between the cause of action and the contacts with Minnesota.⁴⁸ The deceptive trade practices violations,⁴⁹ false statements in advertisements,⁵⁰ and misrepresentations⁵¹ made by the defendant were clearly felt by Minnesota residents. The court relied upon *Maritz, Inc. v. Cyber-Gold, Inc.*,⁵² to conclude that under Minnesota Statutes section 8.31, subdivision 3, the Attorney General was authorized to seek injunc-

45. See *Granite Gate Resorts*, 568 N.W.2d at 718 (citing *State ex rel. Miller v. Baxter Chrysler Plymouth, Inc.*, 456 N.W.2d 371, 377 (Iowa 1990) (concluding that Nebraska auto dealers' acts of advertising in Iowa were sufficient to subject them to suit seeking a halt to the advertisements); *Kugler v. Market Dev. Corp.*, 306 A.2d 489, 491 (N.J. Super. Ct. Ch. Div. 1973) (stating that direct mail solicitation by foreign corporation is sufficient basis for in personam jurisdiction); *State v. Colorado State Christian College*, 346 N.Y.S.2d 482, 485 (N.Y. Sup. Ct. 1973) (concluding that defendants' acts of sales, solicitation by mail over period of five months, and shipment of product constituted business within the state for purposes of jurisdiction); *State v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290, 302 (Wash. 1972) (holding that mailing for purposes of increasing subscriptions and sales satisfies the minimum contacts requirement)).

46. See *Granite Gate Resorts*, 568 N.W.2d at 720; see also *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717, 722 (Minn. 1985) (holding that a corporation cannot avoid jurisdiction by hiding behind the structure of the distribution system when it intended to enter the market and profit thereby).

47. There are two possible explanations for the *Granite Gate* court's error on this point. The first is that it simply did not understand the inner workings of the Internet and the mechanics by which messages are transmitted. A second less altruistic reason is that the court simply wanted to find jurisdiction in this case and, thus, it whitewashed this point.

48. See *Granite Gate Resorts*, 568 N.W.2d at 720.

49. See MINN. STAT. § 325D.44, subd. 1 (1998).

50. See *id.* § 325F.67.

51. See *id.* § 325F.69, subd. 1.

52. 947 F. Supp. 1328 (E.D. Mo. 1996).

tive relief and civil penalties when satisfied that any of the consumer statutes allegedly violated in this case "is about to be violated."⁵³

d. The Interest of the State in Providing a Forum

The court's strongest argument is that for public policy reasons, the Attorney General's office has a strong interest in enforcing consumer protection statutes and regulating gambling in Minnesota. The Attorney General's office clearly could not sue Granite Gate in either Nevada or Belize.⁵⁴ Therefore, in order to give meaning to the State's consumer protection laws, the court reasoned in favor of finding personal jurisdiction.⁵⁵ Although this argument is very strong for the Attorney General's claims, a clear factual distinction should be made for future cases dealing with non-governmental entities.

e. The Convenience of the Parties

Finally, the court found that because WagerNet had reserved the right to sue Minnesota residents in Minnesota as part of the business agreement, the defendants' argument that it was burdensome to defend in Minnesota was without merit.⁵⁶ The court cited the United States Supreme Court decision in *Hanson v. Denckla*⁵⁷ to reinforce its argument that defending in a foreign tribunal was less burdensome due to increased technology, communications, and transportation.⁵⁸

After weighing these five factors, the court determined that

53. *Granite Gate Resorts*, 568 N.W.2d at 720. The phrase "about to be violated" raises an interesting constitutional question as to the ripeness of the Attorney General's claim in this case. *See id.* The facts are clear that although Granite Gate was going to offer on-line gambling services, it had yet to start. *See id.* at 717.

54. *See id.* at 721; *State ex rel. Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 892 (Minn. Ct. App. 1992); *see also State v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290, 303 (Wash. 1972) (holding that Washington courts had jurisdiction over a foreign defendant that advertised there, and noting that "[i]f our courts are not open, the state will be without a remedy in any court and the Consumer Protection Act will be rendered useless").

55. *See Granite Gate Resorts*, 568 N.W.2d at 721.

56. *See id.*

56. 357 U.S. 235 (1958).

58. *See Granite Gate Resorts*, 568 N.W.2d at 721 (citing *Hanson*, 357 U.S. at 250-51). In reality, this entire prong is of minimum significance in this case. The "convenience of the parties" argument can be made by both the plaintiff and defendant, especially when the plaintiff is as sophisticated as the State of Minnesota.

Minnesota's exercise of personal jurisdiction over Granite Gate would be constitutional and comport with traditional notions of fair play and substantial justice.⁵⁹

The *Granite Gate* court recognized that determining the extent to which Internet communications may affect a nonresident defendant is not easily ascertainable.⁶⁰ While the *Granite Gate* court utilized a traditional minimum contacts analysis as a starting point, the court also broke new ground.⁶¹ It had to consider when contacts via the information superhighway required a nonresident defendant to defend itself in a forum in which they have purposefully made cyberspace contact.

The *Granite Gate* court reached the right decision because the defendant purposefully availed itself of the privilege of using the Internet to reach Minnesota residents.⁶² Moreover, because of the Attorney General's interest in protecting Minnesota residents,⁶³ the decision is proper. But, although the *Granite Gate* court reached the correct decision, its reasoning was flawed. The court should have decided *Granite Gate* under a *World-Wide Volkswagen* analysis.⁶⁴ Instead, it chose to analogize Internet advertising with traditional media forms of print, radio, and television.⁶⁵

The court erred in its reasoning when it analogized the Internet to traditional types of media⁶⁶ due to the significant difference in the scope of the target areas of these mediums. On the Internet, the scope of the targeted area is rarely known. The Internet advertiser simply loads his advertisements into a server and customers

59. See *id.*

60. See *id.* at 718-21. See generally Craig Peyton Gaumer, *The Minimum Cyber-Contacts Test: An Emerging Standard of Constitutional Personal Jurisdiction*, 85 ILL. B. J. 58 (1997) (discussing the sufficiency of "cyber contact").

61. See *Granite Gate Resorts*, 568 N.W.2d at 718-21; see also Gaumer, *supra* note 60, at 62-63 (analyzing *CompuServe Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) and *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)). In some cases when the cause of action is closely related to the Internet communication, cyberspace contacts should be enough, standing alone, to satisfy minimum contacts test. See Gaumer, *supra* note 60, at 63.

62. See *supra* notes 38-42 and accompanying text.

63. See *Granite Gate Resorts*, 568 N.W.2d at 721.

64. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (stating that that in order for a forum state to exercise personal jurisdiction over a defendant, the defendant's "conduct and connection with the forum State . . . [must be] such that he should reasonably anticipate being haled into court there").

65. See *Granite Gate Resorts*, 568 N.W.2d at 719-20.

66. See *id.* at 720; see also Bauman, *infra* note 106 and accompanying text.

access that server through phone lines. In contrast, customers of traditional media forms take active roles in pushing their message out to consumers via paper or radio waves allocated to them on a bandwidth. In short, the traditional media forms are active while Internet advertising is passive. Therefore, because the court failed to recognize the basic differences between these two communication forms, the reasoning in the *Granite Gate* decision is tenuous.

However, the *Granite Gate* decision is significant because it is the first case in Minnesota to rule that Internet contacts within Minnesota can be sufficient to satisfy the due process requirements of the U.S. Constitution's Fourteenth Amendment.⁶⁷ The Minnesota Court of Appeals recognized that the Internet is a communication medium that lacks historical parallel in the potential extent of its reach and that regulation across jurisdictions may implicate fundamental First Amendment concerns.⁶⁸

The *Granite Gate* court also noted that it will take time to determine the precise balance between the rights of those who use the Internet to disseminate information and the powers of the jurisdictions in which receiving computers are located to regulate for the general welfare.⁶⁹ In making its decision, the court tried to

67. See Bauman, *infra* note 106 and accompanying text. See also U.S. CONST. amend XIV, § 1 (Due Process Clause).

68. See *Granite Gate Resorts*, 568 N.W.2d at 718. However, in doing so, the court analogized the Internet to mail solicitation (State v. Reader's Digest Ass'n., Inc., 501 P.2d 290, 302-03 (Wash. 1972)); newspapers, television and telephone book advertising (State *ex rel.* Miller v. Baxter Chrysler Plymouth, Inc., 456 N.W.2d 371, 376-77 (Iowa 1990)); and radio advertising (BLC Ins. Co. v. Westin, Inc., 359 N.W.2d 752, 754-55 (Minn. Ct. App. 1985)). *Id.* at 719-20. In a specific jurisdiction case involving national broadcasting, the federal district court in Minnesota upheld the exercise of specific jurisdiction where the defendant's sole contacts with Minnesota were the airing of national television programs which were carried by local American Broadcasting Corporation affiliates in Minnesota. See *Tonka Corp. v. TMS Entertainment, Inc.*, 638 F. Supp. 386, 390-91 (D. Minn. 1985) (transferring the case because it found that although personal jurisdiction existed, proper venue did not). See also U.S. CONST. amend. I (protecting free speech).

69. *Granite Gate Resorts*, 568 N.W.2d at 718. Federal courts considering the issue of personal jurisdiction and Internet contacts have concluded in several cases that the solicitation of business via the Internet can subject a nonresident defendant to personal jurisdiction. See *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996); see also *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997) (holding that operating a web site is sufficient to establish minimal contacts for personal jurisdiction); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (concluding that Internet advertising is designed to communicate with people in every state and, therefore, advertiser could reasonably anticipate the possibility of being haled into any state court); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 5 (D.D.C. 1996) (finding

limit its decision to the facts of this case and stay within the parameters of established legal principles.⁷⁰ The concern is that the holding in *Granite Gate* will be expanded beyond these facts and used in future Internet cases in Minnesota with an even more expansive approach to deciding personal jurisdiction issues.

The court of appeals based its decision in part on Internet cases from other jurisdictions with considerably different facts than those in *Granite Gate*.⁷¹ A comparison of these cases to other similar Internet cases demonstrates the convoluted nature of personal jurisdiction in this area in Minnesota and across the nation.

C. *Maritz, Inc. v. CyberGold, Inc.*

In *Maritz, Inc., v. CyberGold, Inc.*,⁷² the United States District Court for the Eastern District of Missouri found personal jurisdiction over California defendants who maintained a web site advertisement.⁷³ The *Maritz* court utilized the same five-factor analysis as did the *Granite Gate* court and rationalized that because 131 Missouri residents had accessed the defendant's web site, the defendant had purposefully availed itself of the privilege of conducting activities in Missouri.⁷⁴

[The defendant] has consciously decided to transmit advertising information to all [I]nternet users, knowing that such information will be transmitted globally. Thus, [the defendant's] contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal ju-

personal jurisdiction where solicitation of donations occurs through the web site and through newspaper advertising).

70. See *Granite Gate Resorts*, 568 N.W.2d at 721.

71. See *id.* at 718-21.

72. 947 F. Supp. 1328 (E.D. Mo. 1996).

73. See *Maritz*, 947 F. Supp. at 1333.

74. See *id.* See also *Edias Software Int'l, L.L.C., v. Basis Int'l Ltd.*, 947 F. Supp. 413, 422 (D. Ariz. 1996). In *Edias*, the court denied a motion to dismiss for lack of personal jurisdiction filed by a nonresident software producer, in an action brought by a former distributor, alleging among other things, libel, breach of contract, and defamation broadcast over the Internet. *Edias*, 947 F. Supp. at 417. The court applied the Ninth Circuit's three-part test for specific jurisdiction: (1) defendant must perform some act by which he avails himself of the privilege of doing business in the forum; (2) the claim must arise out of the defendant's forum-related activities, and (3) the exercise of jurisdiction must be reasonable. See *id.* The court found that the defendant's Internet activities, including e-mail, web sites, and an Internet forum, constituted a basis for personal jurisdiction. See *id.*

risdiction over the defendant.⁷⁵

In arriving at its decision, the *Maritz* court found that trademark infringement was a tortious act in Missouri, thus providing a basis for personal jurisdiction under state statutory law.⁷⁶ The court rejected the notion that on-line advertising is "passive" advertisement.⁷⁷ Instead, the court viewed the web site as an "active" contact with Missouri, akin to the defendant mailing a letter to a Missouri resident in response to a query by mail from that resident.⁷⁸

The *Maritz* court erred in rejecting the defendant's argument that on-line advertisement is passive in nature. The defendant did violate trademark infringement rights, but in no way did it purposefully avail itself to the laws and protections of Missouri. Moreover, it was not reasonably foreseeable to the defendant that it would be haled to court in Missouri. Because of these fatal flaws, the *Granite Gate* court should not have relied upon the *Maritz* decision.

D. Inset Systems, Inc. v. Instruction Set, Inc.

*Inset Systems, Inc. v. Instruction Set, Inc.*⁷⁹ involved a trademark infringement suit brought in the federal district court in Connecticut.⁸⁰ Although the *Granite Gate* court relied on *Inset* for support, the *Inset* facts are distinguishable from those in *Granite Gate* because the defendant's contacts with the forum state consisted solely of its web page.⁸¹

The district court in *Inset* addressed the jurisdictional issue by inquiring into whether the defendant's conduct of supplying a web page on the Internet satisfied Connecticut's long-arm statute⁸² and the minimum contacts requirement of the Due Process Clause of

75. *Maritz*, 947 F. Supp. at 1333.

76. *See id.*

77. *See id.*

78. *See id.* The court also noted that individuals in Missouri had accessed the defendant's site 131 times (not counting the 180 times that the plaintiff accessed the site), amounting to a significant quantity of contacts. *See id.* Transmitting information through each of those "hits" showed purposeful availment of the privilege of doing business in the state, and justified personal jurisdiction. *See id.*

79. 937 F. Supp. 161 (D. Conn. 1996).

80. *Id.* at 162-63.

81. *See id.* at 162-63 (stating that the defendant neither employed employees in the forum state nor conducted business in the forum on a regular basis).

82. *See id.* at 163 (citing CONN. GEN. STAT. § 33-411(c)(2) (repealed 1997)).

the Fourteenth Amendment.⁸³ The *Inset* court reasoned that the defendant, by the very nature of the World Wide Web, "had been continuously advertising" in Connecticut and therefore had solicited in a "sufficiently repetitive nature to satisfy . . . Connecticut[']s long-arm statute."⁸⁴

The *Inset* court determined that Internet solicitation is even more pervasive than other forms of advertising.⁸⁵ Unlike television and radio, in which advertisements are broadcast at certain times only, or newspapers in which advertisements are often disposed of quickly, the court stated that advertisements on the Internet are available to Internet users continually, at the stroke of a few keys of a computer.⁸⁶ Based on this "contact" with the state, and on the proximity between the forum and defendant's headquarters in Massachusetts, the court found that the elements of due process were met for purposes of long-arm jurisdiction.⁸⁷

The *Inset* court then addressed the issue of "minimum contacts" by first inquiring into whether the defendant "reasonably anticipated being haled into court" in Connecticut⁸⁸ and then by determining whether "maintenance of the suit in the forum state . . . offended traditional notions of fair play and substantial justice."⁸⁹ The court held that due process was satisfied because the defendant reasonably could have anticipated being haled into court in Connecticut since it had "purposefully availed itself of the privilege of doing business within Connecticut" through its web page.⁹⁰ Fur-

83. See *id.* See also U.S. CONST. amend. XIV.

84. *Id.* at 164.

85. See *id.*

86. See *id.*; see also *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 4-5 (D.D.C. 1996) (exercising jurisdiction based on defendant's solicitations via its Internet home page and an advertisement in the *Washington Post*).

87. See *Inset*, 937 F. Supp. at 164.

88. *Id.* at 165. In reaching this conclusion the court compared the facts in *Inset* to *Whelen Eng'g Co., Inc. v. Tomar Elecs., Inc.*, 672 F. Supp. 659 (D. Conn. 1987). See *Inset*, 937 F. Supp. at 164. The court in *Whelen* found that the defendant had purposefully availed itself of the privilege of doing business in the forum state where it had advertised and had "provided products on order." *Whelen*, 672 F. Supp. at 664. The court in *Inset* reached the same conclusion upon finding that the defendant, like the defendant in *Whelen*, had made its advertisements available continuously to any interested person. *Inset*, 937 F. Supp. at 165. The court in *Inset* did not address the fact that its defendant, unlike the defendant in *Whelen*, had not sold any products in Connecticut. See *id.*

89. *Inset*, 937 F. Supp. at 164; see also *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring minimum contacts within the territory of the forum state to satisfy the due process requirement).

90. *Inset*, 937 F. Supp. at 165. The plaintiff asserted that the defendant was

ther, the court reasoned that maintenance of the suit did not offend traditional "notions of fair play and substantial justice"⁹¹ because the defendant resided near Connecticut and the state had an interest in adjudicating the dispute.⁹²

Again, the *Granite Gate* court's reliance on *Inset* is dubious because *Inset* bases its reasoning on the premise that on-line advertising is active rather than passive in nature. Also, the mere act of advertising on the Internet does not mean that a defendant purposefully avails itself of the laws and protections of Connecticut. Thus, the *Granite Gate* court should not have relied on *Inset* for its decision.

E. Hearst Corp. v. Goldberger

Although not mentioned in the *Granite Gate* opinion, the decision in *Hearst Corp. v. Goldberger*,⁹³ a New York case involving trademark infringement over an Internet domain name, is informative in its logical approach to solving Internet personal jurisdiction problems. In *Hearst*, the U.S. District Court for the Southern District of New York ruled that mere ownership of a web site that is accessible to, and visited by, New York computer users does not constitute sufficient contacts with that state to provide its courts with personal jurisdiction over the web site owner.⁹⁴ The court in its ruling stated:

Where . . . a defendant has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional per-

less than two hours away and had retained counsel in Connecticut. *See id.* The state had an interest in adjudicating the dispute because the action concerned issues of Connecticut law. *See id.* The court mentioned all five considerations to be analyzed under *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985), but addressed only two of them. *See Inset*, 937 F. Supp. at 165.

91. *Id.*

92. *See id.* The action was based on a violation of the Federal Trademark Act, 15 U.S.C. §§ 1051-1127. *See id.* at 162.

93. No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

94. *See id.* at *12. *See also* Current Development, *Web Site Does Not, by Itself, Give New York Court Personal Jurisdiction*, 14 COMPUTER L. 28 (1997).

sonal jurisdiction case law nor acceptable to the Court as a matter of policy.⁹⁵

Concededly, the *Hearst* case is distinguishable from *Granite Gate* because the New York long-arm statute does not reach as far as the Minnesota long-arm statute.⁹⁶ However, aside from this difference, the New York court expressly declined to follow *Maritz* and *Inset*.⁹⁷ In both *Maritz* and *Inset*, jurisdiction was found to be appropriate simply because the defendants decided to make advertising available to Internet users, thereby, theoretically at least, purposefully availing themselves of the privilege of doing business in the forum state.⁹⁸ The New York court in *Hearst* stated that these decisions were tantamount to declaring that every court throughout the world may assert jurisdiction over all information providers on the World Wide Web.⁹⁹ Worldwide jurisdiction would have a stifling impact on the use of the Internet and ultimately on businesses that use it.¹⁰⁰ In the absence of a specific congressional instruction creating national jurisdiction over Internet content providers, the magistrate in *Hearst* declined to adopt such a broad theory of jurisdiction.¹⁰¹

Hearst relied upon other cases where federal courts had held that the mere creation of a web site that could be accessed from any state was not sufficient to create personal jurisdiction.¹⁰² In one of these cases, *Bensusan Restaurant Corp. v. King*,¹⁰³ the court held that creating a web site was "like placing a product into the stream

95. *Hearst*, 1997 WL 97097, at *1.

96. Compare N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990) (enumerating acts which constitute the basis for personal jurisdiction under New York's long-arm statute) with MINN. STAT. § 543.19 (1998) (enumerating acts which are the basis of Minnesota's exercise of personal jurisdiction under its long-arm statute).

97. See *Hearst*, 1997 WL 97097, at *20.

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.* at *7.

102. See *id.* at *13, *16; *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996); see also *McDonough v. Fallon McElligott, Inc.*, No. 95-4037, slip op. (S.D. Cal. Aug. 6, 1996). For example, *Bensusan* involved a dispute between the owners of a popular New York jazz club, "The Blue Note," and Richard King, the owner of a small jazz club in Missouri that had the same name. *Bensusan*, 937 F. Supp. at 297. In April 1996, the defendant posted a site on the World Wide Web to promote his club. See *id.* The court dismissed the case for lack of personal jurisdiction. See *id.* at 299.

103. 937 F. Supp. 295 (S.D.N.Y. 1996).

of commerce”¹⁰⁴ Its effects could be “felt nationwide or even worldwide – but, without more, it is not an act purposefully directed toward the forum state.”¹⁰⁵ Based on this clear analytical thinking, the *Granite Gate* court should have relied on the reasoning of the *Hearst* and *Bensusan* opinions instead of that found in *Maritz* and *Inset*.

F. Summary

Granite Gate is Minnesota’s first of what undoubtedly will be many struggles with reconciling the concept of a boundless cyberspace with the antiquated notion that a sovereign exercises power within fixed borders.¹⁰⁶ While the decision in *Granite Gate* was appropriate, the court’s reasoning is fundamentally flawed. The court’s errant assumption in *Granite Gate* is that on-line advertising is a more purposeful contact with a particular forum than is print advertising.¹⁰⁷ Anyone in the world can access almost all on-line advertisements. With print, television, or radio advertising, the advertisers generally know the scope of who is receiving the solicitation. In trying to subject these different communication forms in the same manner, courts are forced to concoct a legal fiction that Internet advertisers intend to avail themselves of the benefits and of the laws of every jurisdiction on Earth.¹⁰⁸

In the future, Minnesota courts deciding Internet related deci-

104. *Bensusan*, 937 F. Supp. at 301. The “stream of commerce” concept takes on a new dimension in the context of web sites which make computer software available for downloading by simply accessing the web site. See Bauman, *infra* note 106 and accompanying text. Only one reported case addresses whether making software available for downloading from the Internet is a sufficient contact to warrant personal jurisdiction over a foreign defendant. See *Hearst*, 1997 WL 97097, at *3.

105. *Bensusan*, 937 F. Supp. at 301.

106. See Lori Irish Bauman, *Personal Jurisdiction and Internet Advertising*, 14 COMPUTER L. 1 (1997). Ms. Bauman argues that the differences in recent decisions are a result of two separate schools of thought. See *id.* at 6. The first views the Internet as a continuous and pervasive advertising mechanism whereby the advertisers have purposefully availed themselves to every forum where their information is downloaded. See *id.* The second views the Internet as a more passive medium, dependent on the actions of local residents to bring it within the state. See *id.* This author subscribes to the second approach and advocates that Minnesota courts should also adopt this second approach in future cases.

107. See *id.* at 3-6.

108. See *id.* However, Ms. Bauman points out that personal jurisdiction is always going to be restricted by the requirement that the claim must arise out of the Internet contact. See *id.* at 5.

sions must be careful to rule that simply advertising on the Internet does not subject defendants to personal jurisdiction.¹⁰⁹ If simply posting an advertisement on the Internet is eventually determined to be sufficient contacts, Minnesota will be creating a nationwide/world-wide jurisdiction.¹¹⁰

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109. *See id.* at 6.

110. *See id.*

